

II. BACKGROUND

A. Legal Framework

3. *Complaint.* On June 14, 2019, Verizon filed its Complaint against Wide Voice under section 208 of the Communications Act of 1934, as amended.¹ At Verizon's request, we bifurcated the case into separate liability and damages phases, deferring consideration of damages issues until a subsequent phase of this proceeding.²

4. *Parties.* Verizon's role in this dispute is as a long-distance carrier that is "a customer and purchaser of switched access services" from Wide Voice.³ Wide Voice is a competitive LEC "subject to the Act" and a provider of switched access services, including tandem-switched transport.⁴

5. *Relevant Non-Parties.* The Complaint also identifies as "relevant non-parties" Wide Voice Communications, Inc.; Native American Telecom, LLC; and Native American Telecom – Pine Ridge, LLC.⁵ According to the Complaint, one or more of these entities, through "common ownership and/or control," are affiliates of Wide Voice and, in that capacity, own the end office to which certain tandem-switched transport traffic is routed via a Wide Voice tandem for termination.⁶ Verizon asserts that Wide Voice's tariff imposes tandem-switched transport rates for such traffic that exceed those authorized by the Commission's rules. Wide Voice denies any affiliation with these entities and also asserts that none of the traffic at issue in the Complaint "was routed to an end office that is owned by an affiliate of Wide Voice."⁷

¹ Formal Complaint of MCI Communications Services, Inc., Proceeding No. 19-121, Bureau ID No. EB-19-MD-003 (filed June 14, 2019) (Complaint or Compl.); Letter from Scott H. Angstreich, Counsel for Verizon, to Lisa B. Griffin, Deputy Chief, Market Disputes Resolution Division, FCC Enforcement Bureau (filed June 19, 2019) (Errata); 47 U.S.C. § 208.

² See Compl. at 4, para. 9 (citing 47 CFR § 1.723(c), (d)). Verizon may file a supplemental complaint for damages within 60 days after public notice of this Order. See 47 CFR § 1.723(e).

³ Joint Statement of MCI Communications, Inc. and Wide Voice, LLC (Jt. Statement) at 2, Stipulated Fact 2.

⁴ Jt. Statement at 2, Stipulated Fact 4; see also 47 CFR § 51.903(i) (definition of "Tandem-Switched Transport Access Service"). We refer to "Tandem-Switched Transport Access Service" as "tandem-switched transport," which is the term used in the relevant tariff provisions at issue in the Complaint. See Section II.B herein. Throughout this Order, we primarily discuss connections between a competitive LEC and a long-distance carrier where those connections go through a tandem. Terminating "tandem switching and tandem-switched transport" are the key interstate exchange access services that are discussed in this Order. These access services may be referred to using different terms in a LEC's tariff. For example, a LEC may have rate elements for tandem-switched transport termination and tandem-switched transport facility or may have a rate element called "common transport" as part of its tandem-switched transport offering. See 47 CFR § 61.26(a)(3) (defining "switched exchange access services" for competitive LECs to include "[t]he functional equivalent of the ILEC interstate exchange access services typically associated with the following rate elements: Carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching"); see also 47 CFR § 69.111(a)(2). We intend this Order to cover such services regardless of the terms used.

⁵ Compl. at 5-12, paras. 15-18; Letter from Scott H. Angstreich, Counsel for Verizon, to Lisa B. Griffin, Deputy Chief, Market Disputes Resolution Division, FCC Enforcement Bureau (filed June 19, 2019) (Errata); 47 U.S.C. § 208.

⁶ Compl. at 2-3, para. 4.

⁷ See Wide Voice, LLC's Answer to Numbered Paragraphs and Legal Brief in Support of Answer, Proceeding No. 19-121, Bureau ID No. EB-19-MD-003 (filed July 3, 2019) (Answer) at 2, para. 4. We have previously notified the parties that issues raised in the parties' discovery requests, including the alleged affiliation between Wide Voice and these identified third parties, will be deferred until the damages phase. See Letter from Lisa B. Griffin, Deputy Chief, Market Disputes Resolution Division, FCC Enforcement Bureau, to Curtis L. Groves, Counsel for Verizon,

(continued....)

6. *The Transformation Order and the Transition to Bill-and-Keep.* In 2011, the Commission initiated comprehensive reforms of its intercarrier compensation regime and adopted a timeline for transitioning to a “bill-and-keep” framework for telecommunications traffic exchanged with LECs.⁸ Under a bill-and-keep arrangement, carriers look first to their subscribers, as opposed to other carriers, to recover their costs.⁹ In the *Transformation Order*, the Commission adopted a multi-year plan for transitioning the rates of certain categories of switched access services to bill-and-keep by July 1, 2018.¹⁰

7. Among other things, the Commission required price cap carriers to reduce—or “step down”—a subset of their terminating tandem switching and transport charges in year six of the transition plan and to further reduce those same charges to zero (i.e., bill-and-keep) in year seven.¹¹ The year six step down, codified in section 51.907(g)(2) of our rules, provides that, “[b]eginning July 1, 2017,” price cap carriers “shall establish, for interstate and intrastate terminating traffic traversing a tandem switch that the terminating carrier or its affiliate owns, Tandem-Switched Transport Access Service rates no greater than \$0.0007 per minute.”¹² Under the year-seven step down, codified in section 51.907(h), price cap carriers were required to further reduce such rates to zero by July 1, 2018.¹³ In the *Transformation Order*, the Commission did not transition other tandem switching and transport charges to bill-and-keep, including “where the terminating carrier does not own the tandem.”¹⁴ Instead, the Commission sought

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and Lauren J. Coppola, Counsel for Wide Voice (July 16, 2019) (on file in EB-19-MD-003). We accordingly defer consideration of Wide Voice’s apparent contention that the step-down rate rule would not apply to traffic terminated to any alleged competitive LEC Wide Voice affiliates. See Wide Voice, LLC’s Legal Brief in Support of Answer at 16-17.

⁸ *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17904-14, paras. 736-59 (2011), *aff’d sub nom*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2050, and 135 S. Ct. 2072 (2015) (*Transformation Order* or *Transformation FNPRM*); *id.* at 17905, para. 741 (“We find that a bill-and-keep framework . . . best advances the Commission’s policy goals and the public interest, driving greater efficiency in the operation of telecommunications networks and promoting the deployment of IP-based networks.”).

⁹ See *Transformation Order*, 26 FCC Rcd at 17904, para. 737; 47 CFR § 51.713 (“Bill-and-keep arrangements are those in which carriers exchanging telecommunications traffic do not charge each other for specific transport and/or termination functions or services.”).

¹⁰ *Transformation Order*, 26 FCC Rcd at 17932-38, paras. 798-808; *id.* at 17934-35, para. 801, Figure 9; see also 47 CFR § 51.907(a)-(h).

¹¹ See *Level 3 Communications, LLC v. AT&T Inc.*, Memorandum Opinion and Order, 33 FCC Rcd 2388, 2389, para. 2 n.4 (2018) (*Level 3 Order*) (citing *Transformation Order*, 26 FCC Rcd at 17934-35, para. 801, Figure 9).

¹² See 47 CFR § 51.907(g)(2) (italics added). See also *id.*, § 61.3(bb) (definition of “Price Cap Local Exchange Carrier”).

¹³ See 47 CFR § 51.907(h) (“[E]ach Price Cap carrier shall, in accordance with bill-and-keep, as defined in § 51.713, revise and refile its interstate switched access tariffs and any state tariffs to remove any intercarrier charges applicable to terminating tandem-switched access service traversing a tandem switch that the terminating carrier or its affiliate owns.”).

¹⁴ See *Transformation Order*, 26 FCC Rcd at 17943, para. 819; see also *Transformation FNPRM*, 26 FCC Rcd at 18115, para 1312 (“the Order provides that bill-and-keep will be the pricing methodology for all traffic and includes the transition for transport and termination within the tandem serving area where the terminating carrier owns the serving tandem switch” but “does not address the transition in situations where the tandem owner does not own the end office”).

further comment on the transition and “proper scope” of such reforms in the accompanying *Transformation FNPRM*.¹⁵

8. Standing alone, the step-down requirements in sections 51.907(g)(2) and (h) do not apply to competitive LECs, like Wide Voice, which are not price cap carriers. However, the Commission determined that the seven-step transition path applicable to price cap carriers would apply to competitive LECs via the competitive LEC benchmark rule.¹⁶ The benchmark rule, which is codified in section 61.26(b), provides in relevant part that “a [competitive LEC] shall not file a tariff for its interstate switched exchange access services that prices those services above” the “rate charged for such services by the competing [incumbent local exchange carrier (incumbent LEC)].”¹⁷ Finally, in the *Transformation Order*, the Commission promulgated section 51.911(c), which similarly limits competitive LECs’ “Access Reciprocal Compensation rates” for switched exchange access services to the “Access Reciprocal Compensation rates charged by the competing incumbent [LEC], in accordance with [section 61.26].”¹⁸

B. Factual Background

9. *Wide Voice’s Tariff*. Wide Voice’s Tariff F.C.C. No. 3 sets forth “the rates, charges, terms and conditions of service” applying to Wide Voice’s provision of “interstate access telecommunications services.”¹⁹ Section 3.6.4 of the Tariff,²⁰ which is at the core of this dispute, establishes two separate “terminating Tandem-Switched Transport” rates, referred to as “Standard” rates and “Affil PCL” rates.²¹ The Standard rates, of up to \$0.03993227 per minute, “are benchmarked to the price cap [carrier] rates which are not subject to the step-down specified in [section 51.907 of the Commission’s rules].”²² In practice, Wide Voice applies the Standard rates to all of its tandem-switched

¹⁵ *Transformation FNPRM*, 26 FCC Rcd at 18112, para. 1306; *id.* at 18113-15, paras. 1307-12. On September 8, 2017, the Wireline Competition Bureau sought to refresh the record on this issue by releasing a public notice seeking comment, *inter alia*, on how to transition tandem switching and transport charges that were not addressed in the *Transformation Order* to bill-and-keep. *See Parties Asked to Refresh the Record on Intercarrier Compensation Reform Related to the Network Edge, Tandem Switching and Transport, and Transit*, WC Docket No. 10-90, CC Docket No. 01-92, DA 17-863, Public Notice, 32 FCC Rcd 6856, 6857 (WCB Sept. 8, 2017).

¹⁶ *Transformation Order*, 26 FCC Rcd at 17905, 17934-35, 17937-38, 17966-67, paras. 739, 801, 807-08, and 866. Although adopting the same transition path, the Commission allowed competitive LECs an “extra 15 days from the effective date of the tariff to which a competitive LEC is benchmarking to make its filing(s).” *Id.* at 17937, para. 807.

¹⁷ 47 CFR § 61.26(b).

¹⁸ 47 CFR § 51.911(c).

¹⁹ Compl., Ex. 8, Wide Voice, LLC, Tariff F.C.C. No. 3 (Tariff).

²⁰ Section 3.6.4, as added on July 14, 2017 (Transmittal No. 7) and in effect until July 18, 2019 (Transmittal No. 13), provided:

The terminating Tandem-Switched Transport rate schedules are bifurcated into “Standard” and “Affil PCL” rates. The Affil PCL terminating Tandem-Switched Transport rates apply to terminating traffic traversing a Company Access Tandem switch when the terminating carrier is a Company-affiliated price cap carrier. All other terminating Tandem-Switched Transport traffic is subject to the Standard terminating Tandem-Switched Transport rates.

²¹ *See* Jt. Statement at 3, Stipulated Fact 7; *see also* Compl. at 18, para. 39; Answer at 7, para. 39.

²² *See* Jt. Statement at 4, Stipulated Fact 12; *see also* Tariff § 3.6.4 n.2 (“Standard terminating Tandem-Switched Transport rates are benchmarked to the price cap LEC rates which are not subject to the step-down specified in Commission Rules 51.907(g)(2) and 51.907(g) (sic).”). Wide Voice’s tandem-switched transport rates are composite rates comprised of various rate elements. *See* Answer Legal Analysis at 4 (citing Tariff §§ 3.8-3.10) (setting forth Standard composite rates that range from \$0.001039 to \$0.03993227 per minute).

traffic.²³ The Affil PCL rates incorporate the step six and step seven rate reductions specified in the *Transformation Order* and section 51.907(g)(2) and (h) of the Commission's rules.²⁴ Under the Tariff, the step-down Affil PCL rate schedule only applies, however, to terminating traffic that traverses a Wide Voice tandem switch when the terminating carrier is a Wide Voice-affiliated price cap carrier. In reality, Wide Voice has never applied the step-down Affil PCL rates of \$0.0007 per minute (as of July 29, 2017) and \$0 per minute (as of August 2, 2018) because Wide Voice has no price cap carrier affiliates.²⁵

10. *The Parties' Dispute.* Between August and November of 2018, Verizon and Wide Voice exchanged email correspondence relating to Verizon's internal audit of Wide Voice's tandem-switched transport charges.²⁶ The parties disagreed about whether Wide Voice should have been billing Verizon the higher Standard Tandem-Switched Transport rate as of July 29, 2017 or the step-down Affil PCL rate.²⁷ On November 14, 2018, Verizon asked Wide Voice why it "isn't following step 6 or step 7 of the [intercarrier compensation] reform rules" concerning terminating tandem switching charges where "*Wide Voice owns the end office and tandem switching equipment.*"²⁸

11. Wide Voice responded by stating "Wide Voice is billing precisely in accordance with our tariffs."²⁹ Wide Voice also referenced the Commission's *Level 3 Order*,³⁰ in which the Commission ruled that the rate step down for tandem-switched transport in section 51.907 applies only when a price cap carrier is terminating the traffic and the price cap carrier or its affiliate also owns a tandem switch that the traffic traverses. Wide Voice contended that, under the *Level 3 Order*, it was not subject to the tandem-switched transport step-down requirements in section 51.907 because none of the billed traffic terminated to an end office owned by a price cap carrier affiliate of Wide Voice.³¹

12. On December 18, 2018, Verizon sent a "Notice of Dispute" to Wide Voice challenging the Tariff, asserting that "[f]or traffic traversing Wide Voice's tandem and terminating to an end office of a Wide Voice affiliate within the service territory of a [price cap carrier], the FCC [intercarrier compensation and benchmark] rules prescribe that [competitive LEC] tariff rates shall be no more than \$.0007/[minutes of use] as of July 1, 2017, and shall be zero ('bill and keep') as of July 3, 2018."³² In late December 2018, Verizon and Wide Voice exchanged further correspondence expressing opposing views regarding the step-down and benchmark rules, the sufficiency of Verizon's Notice of Dispute, and Verizon's asserted right to withhold payment of disputed invoices.³³

13. On July 3, 2019, Wide Voice filed Transmittal No. 13 with the Commission, which proposed further revisions to Tariff section 3.6.4.³⁴ As revised, section 3.6.4 continues to bifurcate Affil

²³ See Jt. Statement at 4, Stipulated Fact 12; Answer Legal Analysis at 4.

²⁴ Tariff § 3.6.4 n.1 ("Affil PCL terminating Tandem-Switched Transport rates are benchmarked to the price cap LEC rates which are subject to the step down specified in Commission Rules 51.907(g)(2) and 51.907(g) (sic)."). Affil PCL stands for affiliated price cap local exchange carrier.

²⁵ Jt. Statement at 4, Stipulated Fact 12.

²⁶ Compl., Ex. 1 at VZ_0000001-00000033.

²⁷ *Id.*

²⁸ *Id.*, Ex. 1 at VZ_0000005 (italics added).

²⁹ *Id.*, Ex. 1 at VZ_0000004.

³⁰ *Level 3 Order*, 33 FCC Rcd 2388.

³¹ Compl., Ex. 1 at VZ_0000004.

³² *Id.*, Ex. 2 at VZ_0000038.

³³ *Id.*, Ex. 2 at VZ_0000041-VZ_0000049.

³⁴ See Tariff, Transmittal No. 13, § 3.6.4 (filed July 3, 2019). Verizon and another carrier challenged these revisions. See *Wide Voice, LLC July 3, 2019 Access Charge Filing, Transmittal No. 13*, Petition of Verizon and

PCL and Standard Tandem-Switched Transport rates in the manner described in prior versions of the Tariff, but the section now includes an illustrative list of categories of providers (excluding Wide Voice-affiliated price cap carriers) to which its Standard rates apply.³⁵

III. DISCUSSION

14. We conclude that section 3.6.4 of Wide Voice's Tariff is unjust and unreasonable under section 201(b) of the Act and that Wide Voice billed Verizon pursuant to its unlawful Tariff provision in violation of sections 201(b) and 203(c) of the Act. We therefore grant Count I of the Complaint as described in this Order. We conclude that Wide Voice may not bill any amounts for terminating tandem-switched transport service in violation of sections 51.907, 51.911, and 61.26 of our rules, as interpreted herein, and we order Wide Voice to amend its Tariff in accordance with this Order within 60 days from the release date of this Order. We therefore grant Count III to the extent described in this Order. In the damages phase of this proceeding, we will address Verizon's request for monetary damages for amounts that Verizon alleges Wide Voice unlawfully billed and collected under its Tariff.

A. Wide Voice's Tariff Violates the Commission's Intercarrier Compensation and Benchmark Rules

15. Verizon alleges that Tariff section 3.6.4 violates the Commission's step-down and benchmark rules by authorizing Wide Voice to charge its Standard Tandem-Switched Transport rates, rather than the step-down rates codified in sections 51.907(g)(2) and (h) of our rules, for terminating switched access calls that are routed through both a Wide Voice tandem and a Wide Voice (or an affiliate's) end office.³⁶ We find that Tariff section 3.6.4 is unlawful and void *ab initio* because it authorizes Wide Voice to charge tandem-switched transport rates that exceed those charged by the competing incumbent LEC to which Wide Voice benchmarks for the same service in violation of the Commission's intercarrier compensation and benchmark rules.³⁷

16. Start with the benchmarking rule. That rule (codified in section 61.26(b)(1)) bars Wide Voice from charging rates higher than the competing incumbent LEC for interstate switched exchange access service, including tandem-switched transport service.³⁸ Or more precisely, "a [competitive LEC] shall not file a tariff for its interstate switched exchange access service that prices those services above the higher of ... [t]he rate charged for such services by the competing [incumbent LEC]"³⁹

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AT&T to Suspend or Reject Wide Voice's Tariff (filed July 10, 2019). On July 16, 2019, Wide Voice filed a response to the July 10th petition. *See Wide Voice, LLC July 3, 2019 Access Charge Filing, Transmittal No. 13, Response of Wide Voice, LLC to Petition of Verizon and AT&T to Suspend or Reject Wide Voice's Tariff* (filed July 16, 2019). Because the Wireline Competition Bureau took no action on the July 10th petition, the Transmittal No. 13 revisions became effective on July 18, 2019.

³⁵ Tariff § 3.6.4.

³⁶ Compl. Legal Analysis at 9-14; Reply in Support of Formal Complaint, Proceeding No. 19-121, Bureau ID No. EB-19-MD-003 at 1-6 (filed July 10, 2019) (Reply).

³⁷ In the alternative, Verizon argues that section 3.6.4 is independently unlawful because Wide Voice drafted its Tariff to create the appearance that it was properly implementing the step downs in section 51.907(g)(2) and (h), when it was not. Compl. Legal Analysis at 14-15; Reply at 4 n.6. Construing that ambiguity against Wide Voice, the drafter of the tariff, Verizon argues that the Commission should read section 3.6.4 to implement the step downs and conclude that Wide Voice violated its Tariff by billing Verizon Standard rates for traffic that should have been billed at the Affil PCL rates. Compl. at 24, paras. 62-63. Based on our conclusion that Tariff section 3.6.4 violates the intercarrier and benchmark rules, we do not reach this issue.

³⁸ 47 CFR § 61.26(b)(1). Section 51.911(c) similarly provides that competitive LEC intercarrier compensation rates for switched exchange access services "shall be no higher than the . . . rates charged by the competing incumbent [LEC], in accordance with the same procedures specified in § 61.26." *See* 47 CFR § 51.911(c).

³⁹ 47 CFR § 61.26(b)(1).

17. The next logical question is what rate may the competing incumbent LEC charge for tandem-switched transport service. Here, sections 51.907(g)(2) and (h) of our rules provide the answer. The tariffed service described in section 51.907 is “*terminating tandem-switched access service traversing a tandem switch that the terminating carrier or its affiliate owns.*”⁴⁰ Under these rules, the maximum rate that a price cap carrier may lawfully charge for this service is \$0.0007 per minute (as of July 29, 2017) and \$0 per minute (as of August 2, 2018).⁴¹ Thus, a price cap carrier/tandem owner must step down its tariffed rate for tandem-switched transport traffic that terminates to its own end office.⁴²

18. And how do these rules apply to a competitive LEC? Quite straightforwardly: When a competitive LEC/tandem owner benchmarks to a price cap carrier subject to sections 51.907(g)(2) and (h), the competitive LEC is the tariffing carrier.⁴³ The tariffed service remains as described in sections (g)(2) and (h), and the maximum rate that the competitive LEC may lawfully charge is the “rate charged for *such service*” by the price cap carrier to which it benchmarks (i.e., \$0.0007 per minute as of July 29, 2017, or \$0 as of August 2, 2018).⁴⁴ Thus, a benchmarking competitive LEC/tandem owner must step down its tandem-switched transport rate for traffic that traverses a tandem switch owned by it or its affiliate and terminates to its own end office. The overlay of the benchmark rule on top of section 51.907 thus ensures that a benchmarking competitive LEC’s tariffed rate will not exceed the “rate charged for such service[s] by the competing [incumbent LEC.]”⁴⁵ where the “service” is that described in sections 51.907(g)(2) and (h).⁴⁶

19. In other words, our rules require any price cap LEC to which Wide Voice benchmarks to step down its rates for terminating tandem-switched transport service when it owns the tandem and

⁴⁰ 47 CFR § 51.907(h) (italics added). Section 51.907(g)(2) similarly describes the tariffed service therein as “Tandem-Switched Transport Access Service” for “terminating traffic traversing a tandem switch that the terminating carrier or its affiliate[] owns.” *Id.* § 51.907(g)(2).

⁴¹ Indeed, price cap carriers to which Wide Voice benchmarks have incorporated the requirements of section 51.907(h) into their current tariffs by establishing one rate (i.e., zero) for tandem-switched transport traffic that terminates to the price cap carrier’s own end office (or to the end office of a price cap carrier affiliate) and a separate non-zero rate for tandem-switched Transport traffic that terminates to other destinations. *See, e.g.,* The Verizon Telephone Companies, Tariff F.C.C. No.1, § 6.9.1(B) (applying step-down rate to Tandem Switched Transport traffic “[t]erminating to Telephone Company End Offices” and applying higher rate to Tandem Switched Transport traffic “[t]erminating to Third Party”).

⁴² The rule also applies when a price cap carrier is terminating the traffic and the price cap carrier’s affiliate owns a tandem switch that the traffic traverses.

⁴³ *Transformation Order*, 26 FCC Rcd at 17934-35, para. 801 fig. 9 (chart indicating that step-down rates apply to “[p]rice [c]ap [c]arriers and [competitive LECs] that benchmark access rates to price cap carriers”); *id.* at 17937, para. 807 (noting that the Commission’s “access reforms will generally apply to competitive LECs via the [competitive LEC] benchmarking rule”).

⁴⁴ *See* 47 CFR § 61.26(b)(1) (prohibiting a competitive LEC from filing a tariff for an interstate switched exchange access service that prices that service above the “rate charged for *such service*” by the competing [incumbent LEC]”) (italics added); *see also id.* § 61.26(a)(2) (“Competing [incumbent LEC]” refers to the incumbent LEC “that would provide interstate exchange access services . . . to the extent those services were not provided by the [competitive LEC]”); *id.* § 61.26(a)(3)(i) (“Switched exchange access services” include “[t]he functional equivalent of the [incumbent LEC] interstate exchange access services . . .”).

⁴⁵ *See* 47 CFR § 61.26(b)(1).

⁴⁶ *See* 47 CFR § 51.907(g)(2), (h); *see also Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9925, para. 3 (2001) (noting that, in adopting the competitive LEC benchmark rule, the Commission intended to eliminate regulatory arbitrage opportunities with respect to tariffed competitive LEC access services by more closely “align[ing] tariffed [competitive LEC] access rates with those of the incumbent LECs.”).

terminates the call; and therefore, Wide Voice must step down its rates whenever it owns the tandem and terminates the call.

20. But Wide Voice's Tariff does not step down the tandem-switched transport rate for traffic that traverses a tandem owned by it or an affiliate and terminates to its end office. Instead, by stepping down its rate only for traffic that terminates to a Wide Voice-affiliated price cap carrier (of which there are none), Wide Voice has improperly added a "price cap carrier" phrase into the service description clause of sections (g)(2) and (h) to ensure that the step-down rates *never* apply to it despite the benchmark rule. This practice is plainly unlawful under sections 51.907 and 61.26 of our rules, which require that the step-down rates apply to all Wide Voice tandem-switched transport traffic that terminates to a Wide Voice end office and traverses a tandem that Wide Voice or its affiliate owns.

21. We find Wide Voice's counterarguments unavailing. Relying on language in the *Level 3 Order*, Wide Voice claims that the step-down rules apply "only to tandem switching and transport traffic that terminates to a price cap carrier end office."⁴⁷ Since Wide Voice is not a price cap carrier, it claims that the step-down rules, by definition, do not apply to it when it terminates traffic.

22. Wide Voice's reliance on the *Level 3 Order* is misplaced. In *Level 3*, the tariffing carrier was a price cap carrier, and thus the Commission examined the text of section 51.907(g)(2) and the *Transformation Order* in that context, concluding that the rule applies when the price cap carrier itself is terminating tandem-switched traffic and the price cap carrier or its affiliate also owns the tandem switch that the traffic traverses.⁴⁸ Because the tariffing carrier in the *Level 3 Order* was a price cap carrier, however, the Commission had no reason to address—and did not address—the interplay between section 51.907(g)(2) and the competitive LEC benchmark rule in section 61.26, as we do here.

23. More broadly, this argument misses the point. No one claims that sections 51.907(g)(2) or (h) directly apply to Wide Voice. Instead, Wide Voice's conduct is governed by the benchmark rule. And under the express language of the benchmark rule, Wide Voice's rates cannot exceed the competing incumbent LEC's rates for comparable service. Here, the comparable service is terminating tandem-switched transport service "for interstate and intrastate terminating traffic traversing a tandem switch that the terminating carrier or its affiliates owns."⁴⁹ And the competing incumbent LEC offering that service is a price cap carrier, subject to the step-down requirements of section 51.907.

24. Wide Voice also argues that requiring it to step down its rate for traffic traversing its or an affiliate's tandem and terminating to its end office improperly requires Wide Voice to "assume the regulatory classification of a price cap carrier end office rather than benchmarking to the rate for the same tandem switching service."⁵⁰ To the extent its objection is that a step-down places Wide Voice in the shoes of a price cap carrier when it is not one, that is exactly what the language and purpose of the Commission's rules requires in the limited context of effecting the intercarrier compensation transition established by the Commission. Wide Voice concedes that when a price cap carrier terminates traffic traversing a tandem owned by it or an affiliate, the price cap carrier must step down its rates.⁵¹ Thus, when a benchmarking competitive LEC terminates traffic traversing a tandem owned by it or an affiliate (i.e., the service described in sections 51.907(g)(2) and (h)), it too must step down its rate as required by the benchmark.⁵²

⁴⁷ Answer Legal Analysis at 10 (quoting *Level 3 Order*, 33 FCC Rcd at 2392, paras. 3, 17).

⁴⁸ *Level 3 Order*, 33 FCC Rcd at 2392-94, paras. 12-15.

⁴⁹ 47 CFR § 51.907(g)(2). See also 47 CFR § 51.907(f) (referencing "terminating tandem-switched access service traversing a tandem switch that the terminating carrier or its affiliate owns").

⁵⁰ Answer Legal Analysis at 18.

⁵¹ *Id.* at 9.

⁵² *Id.* at 18.

25. Wide Voice asserts that requiring it to step down its rates in the manner set forth in section 51.907 would result in “discrimination and disparate treatment by continuing to entitle the [incumbent LECs] to whom Wide Voice benchmarks to charge their full rates while . . . requiring Wide Voice to provide those exact services for free.”⁵³ This argument rests on an incorrect reading of the service described in sections (g)(2) and (h). A competing price cap carrier to which Wide Voice benchmarks would be required to tariff a rate of \$0.0007 per minute or zero for traffic that sections 51.907(g)(2) or (h) encompasses and, like Wide Voice, the competing price cap carrier could charge a higher/nonzero rate for other traffic. It is Wide Voice’s tariff that results in “discrimination and disparate treatment,”⁵⁴ by permitting Wide Voice to charge the standard rate while its competing price cap carrier is required to apply the step-down rates for the same type of traffic.⁵⁵

B. The Challenged Tariff Provision Is Void *Ab Initio*

26. Verizon contends that section 3.6.4 of the Tariff is “illegal, unlawful, and void *ab initio* because it purports to authorize Wide Voice to charge terminating switched access rates that are prohibited by §§ 51.907 and 61.26.”⁵⁶ We agree. The Commission has consistently reaffirmed that a competitive LEC may not file a tariff with rates above the benchmark and that a tariff purporting to charge a rate that exceeds the benchmark is void *ab initio* and not deemed lawful.⁵⁷

27. Wide Voice counters that because the Commission did not suspend or reject the Tariff within the time allowed for challenging a streamlined tariff, the Tariff is “deemed lawful” under section 204(a)(3) of the Act and the Commission’s 1997 implementing order.⁵⁸ Wide Voice’s statement, however, ignores Commission precedent holding that “deemed lawful” status does not adhere to a tariff provision that the Commission’s rules prohibited at the time of filing.⁵⁹ Indeed, a tariff containing “rates

⁵³ *Id.* at 14-15. Wide Voice erroneously suggests that bill and keep results in “free” service. In fact, bill and keep only changes the person or entity from whom a carrier may recover its costs—*i.e.*, from the carrier’s end user rather than from the interexchange carrier.

⁵⁴ *Id.* at 14.

⁵⁵ Further undercutting Wide Voice’s claim of discriminatory treatment is Verizon’s statement that its competitive LEC affiliates, “like Verizon’s ILECs,” step down their rates “where calls go through both a tandem and end office that the Verizon [competitive LEC] owns.” See Reply at 6.

⁵⁶ Compl. at 23, para. 58.

⁵⁷ See, e.g., *AT&T Servs., Inc. v. Great Lakes Commnet, Inc.*, Memorandum Opinion and Order, 30 FCC Rcd 2586, 2595, para. 28 (2015) (a tariff “that includes rates in excess of the applicable benchmark in [s]ection 61.26 is subject to mandatory detariffing” such that the “carrier is prohibited from filing a tariff with rates above the benchmark”); *AT&T Corp. v. All Am. Tel. Co.*, Memorandum Opinion and Order, 28 FCC Rcd 3477, 3494, para. 37 (2013) (footnote omitted) (until a competitive LEC files a valid tariff for the access services it intends to provide, “it lacks authority to bill for those services”).

⁵⁸ Answer Legal Analysis at 5, 20-21 (citing *Implementation of Section 402(b)(1)(A)*, 12 FCC Rcd 2170, paras. 19-20 (1997)). Section 204(a)(3) provides that a LEC “may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis” and that “such charge, classification, regulation, or practice . . . shall be deemed lawful.” See 47 U.S.C. § 204(a)(3) (providing for 7 and 15-day waiting periods before a tariff filed on a streamlined basis shall be effective).

⁵⁹ See *AT&T Corp. v. Iowa Network Servs., Inc. d/b/a Aureon Network Servs.*, Memorandum Opinion and Order, 32 FCC Rcd 9677, 9692, para. 29 (2017). Here, as in *Aureon*, Wide Voice’s rates cannot be “deemed lawful,” because they violated the Commission’s specific benchmarking rules as a threshold matter. Section 204(a)(3) does serve as a “conclusive presumption of reasonableness,” in assessing whether a proposed rate is just and reasonable as required by the general charge of section 201(b). See *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 411 (D.C. Cir. 2002). But no such assessment is necessary or required here, because Wide Voice’s rates were not permissible to begin with. We do not construe section 204(a)(3) to have intended for the Commission to “deem lawful” tariffs filed in violation of specific Commission rules, or rates embodied in such tariffs that Wide Voice was thus not “permitted to charge.” *Virgin Islands Tel. Co. v. FCC*, 444 F.3d 666, 669 (D.C. Cir. 2006).

that the carrier is not permitted to charge does not even meet the preliminary standard for a legal tariff filing, and thus “cannot become a ‘deemed lawful’ tariff by operation of section 204(a)(3).”⁶⁰ Based on our determination in section III.A. above that Wide Voice’s Tariff contained rates for tandem-switched transport service that exceeded the required benchmark at the time of their filing in violation of section 61.26(b) of our rules, we conclude that Tariff section 3.6.4 is void *ab initio*.⁶¹

IV. ORDERING CLAUSES

28. Accordingly, **IT IS HEREBY ORDERED**, pursuant to sections 1, 4(i), 4(j), 201, 203, 204, 208, and 415 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 204, 208, 415, and sections 1.720-1.735, 51.907, 61.2, and 61.26 of the Commission’s rules, 47 CFR §§ 1.720-1.735, 51.907, 61.2, 61.26, that Count I **IS GRANTED** as described herein.

29. **IT IS FURTHER ORDERED**, pursuant to sections 1, 4(i), 4(j), 201, 203, 204, 208, and 415 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 204, 208, 415, and sections 1.720-1.735, 51.907, 61.2, and 61.26 of the Commission’s rules, 47 CFR §§ 1.720-1.735, 51.907, 61.2, 61.26, that Count III **IS GRANTED** to the extent described herein, and Wide Voice may not bill any amounts for terminating tandem-switched transport service in violation of sections 51.907, 51.911, and 61.26 of the Commission’s rules, as interpreted herein, and must file a new interstate tariff containing revisions to tariff section 3.6.4 within 60 days from the release of this Order in accordance with the findings and conclusions adopted in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶⁰ *Aureon Recon Order*, 33 FCC Rcd at 7969, para. 15 (noting that “[a] contrary ruling would have the effect of immunizing from later attack rates that directly violate Commission rules prohibiting specific rate levels at the time of filing”).

⁶¹ Verizon also asks the Commission to find that two dispute resolution provisions in Wide Voice’s Tariff are unjust and unreasonable in violation of section 201(b) of the Act and void *ab initio*. Compl. at 27-28, paras. 80-81; Compl. Legal Analysis at 18-20. According to Verizon, Wide Voice has cited these provisions “as bases for denying Verizon’s disputes of Wide Voice’s failure to comply with §§ 51.907 and 61.26 [of the Commission’s rules].” Compl. at 27, para. 74. *Id.* at 27, para. 80 (“Wide Voice has relied on those dispute resolution provisions as the basis for denying Verizon’s dispute.”); Compl. Legal Analysis at 18 (stating that Wide Voice has “raised [the dispute resolution provisions] as procedural barriers to Verizon’s disputes”). As explained above, we agree with Verizon that section 3.6.4 of Wide Voice’s Tariff is unlawful and void *ab initio* because, when filed, the Tariff’s tandem-switched transport rates violated the Commission’s step-down rules (47 CFR § 51.907) and benchmark rules (47 CFR § 61.26). Because we hold that, under the current Tariff, Wide Voice may not bill Verizon any amounts for terminating tandem-switched transport service, we need not reach the issue of whether the Tariff’s dispute resolution provisions are unjust and unreasonable by requiring Verizon to pay the unlawful charges. We also reject Wide Voice’s affirmative defense that the dispute resolution procedures in its Tariff prevent the Commission from examining the lawfulness of its Tariff in a section 208 complaint proceeding. *See Answer* at 15 (Affirmative Defenses), para. 2. Even if these dispute resolution procedures were lawful—a question we do not reach here—a carrier cannot rely on dispute resolution procedures to prevent the Commission from addressing the lawfulness of a tariff in a section 208 proceeding. *See Reply* at 16-17 & n.52 (citing *GS Texas Ventures LLC*, Order, 29 FCC Rcd 10541, 10543, para. 6 (WCB/Pricing) (“In light of our finding that the arbitration requirement contained in the proposed tariff conflicts with section 208, we further find that GS Texas Ventures’ inclusion of section 2.10.4.I in its proposed tariff is unjust and unreasonable under [s]ection 201(b) of the Act.”)).